NOVA SCOTIA COURT OF APPEAL

Citation: *Cape Breton Firefighters Association, IAFF Local 2779 v. Cape Breton (Regional Municipality)*, 2017 NSCA 92

Date: 20171215
Docket: CA 459691
Registry: Halifax

Between:

Cape Breton Firefighters Association,
IAFF Local 2779

Appellant

v.

Cape Breton Regional Municipality and
the arbitration board comprised of Susan M. Ashley,
Tony Mozvik, and Larry Cook

Respondents

Judges:	Beveridge, Farrar and Bourgeois, JJ.A.
Appeal Heard:	October 17, 2017, in Halifax, Nova Scotia
Held:	**Appeal allowed per reasons for judgment of Farrar, J.A.; Beveridge and Bourgeois, JJ.A. concurring.**
Counsel:	Sean P. McManus, for the appellant Demitrius Kachafanas, for the respondent Cape Breton Regional Municipality Respondent Susan M. Ashley not appearing Respondent Tony W. Mozvik not appearing Respondent Larry Cook not appearing

Reasons for judgment:

Introduction

[1] The Cape Breton Regional Municipality restructured its workplace, in part, by closing a fire station and reducing the number of firefighters assigned to each shift. The Cape Breton Firefighters Association (the Union) grieved the restructuring on the basis that the Municipality failed to respect the requirement to retain an overall minimum staffing level.

[2] The grievance was heard by a board chaired by Professor Philip Girard. It concluded that the Municipality failed to respect the requirement to retain an overall minimum staffing level and issued a declaration that the Municipality had breached the collective agreement.

[3] The Municipality continued to staff the fire station at the same levels as before the grievance. As a result, the Union brought a second grievance alleging a continuing breach of the collective agreement. That grievance was heard before a Board of Arbitration chaired by Susan Ashley. The majority of the Ashley Board[1] concluded that since the Girard Board had found that a declaration was a sufficient remedy, it was not prepared to revisit the issue of remedy and dismissed the grievance.

[4] The Union filed an application for judicial review. Justice Frank Edwards dismissed the application finding that the Ashley Board decision was reasonable .

[5] The appellant appeals arguing the application judge erred in concluding the Ashley Board rendered a reasonable decision in dismissing the Union's grievance.

[6] For the reasons that follow, I would allow the appeal, set aside the decision of the application judge and the decision of the Ashley Board. I would refer the matter to a new Board for rehearing. I would also award costs to the Union in the amount of $3,000 inclusive of disbursements. To the extent the costs award of $1,000 in the court below has been paid to the Municipality, I would order it repaid to the Union.

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[1] There was a dissent by one of the Panel members on the Ashley Board. When I refer to the Ashley Board decision or the Ashley Board I am referring to the majority.

Background

[7] In 2009 the Municipality closed the Ashby Fire Station in Sydney. It then redistributed the employees at Ashby to other stations and initiated staffing changes at the remaining stations that resulted in the loss of two firefighter positions overall.

[8] The Union grieved the Municipality's decision arguing that it did not have authority to make the changes under the collective agreement.

[9] Article 27.01 of the Collective Agreement titled "Minimum Staffing" with a sub-heading "Career Firefighters" provides:

> 27.01 The Community of Sydney will maintain a minimum staff per shift as follows:
>
> | | | | |
> |---|---|---|---|
> | Station #1 | Central | 3 firefighters | 1 captain |
> | Station #2 | Ashby | 2 firefighters | 1 captain |
> | Station #3 | Pier | 2 firefighters | 1 captain |

[10] On December 4, 2013, the Girard Board upheld the grievance. It concluded that, while the Municipality had the ability to close a station, the overall minimum staff on a shift could not be reduced:

> As currently worded, however, art. 27 assumes that there is one "shift" for the community as a whole and then shows how the firefighters on duty during that shift are to be distributed among the stations. The distribution among the stations is a way of calculating the minimum staff that the Municipality is required to "maintain" during each shift. But it does not follow that if one station is closed, the minimum staff associated with that station need not be "maintained." In other words, art. 27 is to be read as if it said "will maintain a minimum staff [of firefighters, calculated] as follows".
>
> During argument, Mr. Kachafanas stated in response to a question that if the Municipality decided to close all the stations, it could do so and would not have to maintain any of the firefighters associated with them. As noted earlier, if the article were framed as an obligation to maintain a minimum staff at each station, he might be right. But I cannot see how this interpretation is consistent with the current wording of the article. The obligation in art. 27 is to "maintain a minimum staff per shift." Such an action by the Municipality would deny that there was any obligation to maintain a "minimum staff per shift." …
>
> The article in question here does not state the minimum staffing requirement in quite the same way, but in stating that the minimum staff is to be calculated "per

> shift", I conclude that it has in effect provided a formula to calculate the minimum number of staff that the Municipality is obliged to retain during the currency of the collective agreement. There is only one shift in Sydney at a given time, and the number of firefighters per station is to be totalled to arrive at the "minimum staff per shift", i.e., the minimum number of firefighters on duty at that time. The disappearance of one or more stations has no effect on the calculation of this number.
>
> In allowing the minimum staffing per shift to fall below the number of ten, I find, therefore, that the Municipality has violated the collective agreement.

[Emphasis added]

[11] The Girard Board found that Article 27.01 requires that in the community of Sydney, there must be at least seven firefighters and three captains on shift at any one time.

[12] On the issue of remedy, the Union sought only a declaration of breach. The Girard Board granted that remedy. The Union sought no other remedy nor were any other remedies awarded.

[13] Subsequent to the Girard Board decision, the Municipality continued to assign only six firefighters and two captains to each shift. On February 19, 2014, the Union filed a further grievance stating:

> The Association grieves that the employer has continued to violate the minimum staffing provisions of Article 27.01 of the collective agreement, notwithstanding the recent arbitration award of arbitrator Girard who provided a binding interpretation of Article 27.01. At arbitration, the Association will seek an order compelling the employer to abide by the minimum staffing guarantees set out in Article 27.01, along with the payment of damages, including aggravated and punitive damages arising from the fact that the employer has intentionally disregarded the findings of arbitrator Girard.

[14] The grievance was referred to the Ashley Board. The Ashley Board dismissed the grievance, essentially finding that the issue had been addressed by the Girard Board and that the second grievance was nothing more than asking for an additional remedy, one which they had not sought before the Girard Board.

[15] The Ashley Board further found that the Municipality's actions could not be interpreted as a continuing breach of the collective agreement.

[16] As noted earlier, on Judicial Review, the application judge upheld the Ashley Board decision. I will set out his reasons in more detail later.

[17] The Union appeals.

Issue:

> Did the application judge err in concluding that the majority of the Ashley Board rendered a reasonable decision in dismissing the Union's grievance and in failing to find the Municipality continued to breach Article 27?

Standard of Review

[18] On appeal, the question is whether the application judge identified the appropriate standard of review and applied it correctly. The process involves the appellate court stepping into the shoes of the lower court. In *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, Justice Abella, for the Court, summarized the appellate approach:

> [46] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247, Deschamps J. aptly described this process as "'step[ping] into the shoes' of the lower court" such that the "appellate court's focus is, in effect, on the administrative decision" (emphasis deleted).
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> [47] The issue for our consideration can thus be summarized as follows: Did the application judge choose the correct standard of review and apply it properly?
>
> [Emphasis added]

[19] Reasonableness governs judicial review of the arbitration board's exercise of its core functions under the *Trade Union Act*, R.S.N.S. 1989, c. 475. Determining whether there has been a breach of a collective agreement is a core function of an arbitration board. Therefore, its decision is reviewed on a reasonableness standard. (*Egg Films Inc. v. Nova Scotia (Labour Board)*, 2014 NSCA 33, ¶24, leave to appeal refused, [2014] SCCA 242).

[20] With this standard of review in mind I will now turn to the sole issue on this appeal.

Analysis

[21] On the application the parties agreed the standard of review was reasonableness. The application judge accepted reasonableness was the proper standard. However, with respect, he failed to properly apply it.

[22] The application judge's reasons for accepting the Ashley Board decision are relatively short and I will repeat them here:

> [7] The Board did not render an unreasonable decision. The Board did not misstate its mandate by finding that it was being asked to enforce a remedy given by an earlier Board (Girard). It reviewed the entire factual context and determined that that was essentially what it was being asked to do. It had every right to make that determination.
>
> [8] *Girard* had noted that the collective agreement had expired. *Girard* also noted that the Municipality had acted in a responsible way in dealing with an urgent situation.
>
> [9] *Ashley*, in paragraph 30 quoted above, referred to the "particular context outlined above" and noted that the bare declaration granted by *Girard* was a sufficient remedy. "The expiry of the collective agreement would provide an opportunity for the parties to reconsider Article 27 in light of the changed circumstances." Though she stopped short of finding the matter was *res judicata*, *Ashley* found that *Girard* had "considered, and rejected, "the possibility of granting a further remedy beyond the requested declaration.

[23] With respect, as will become readily apparent, applying the standard of review to the Ashley Board decision leads to no other conclusion than it is unreasonable. The application judge made the same error as the Ashley Board - he misunderstood the nature of the issue the Ashley Board was asked to address.

[24] For ease of reference I will, again, set out the grievance which was referred to the Ashley Board for determination:

> The Association grieves that the employer has continued to violate the minimum staffing provisions of Article 27.01 of the collective agreement, notwithstanding the recent arbitration award of arbitrator Girard who provided a binding interpretation of Article 27.01. At arbitration, the Association will seek an order compelling the employer to abide by the minimum staffing guarantees set out in Article 27.01, along with the payment of damages, including aggravated and punitive damages arising from the fact that the employer has intentionally disregarded the findings of arbitrator Girard.

[Emphasis added]

[25] The Ashley Board fundamentally misunderstood the nature of the grievance it had before them. It starts out by citing the grievance I have set out above and then immediately identifies its mandate as being the enforcement of an award of the Girard Board:

> 2. The current grievance essentially seeks enforcement of an Award of an Arbitration Board chaired by Philip Girard, with the same nominees as on this Board. The Girard Award allowed the grievance, granting a declaration that the Employer had failed to comply with Article 27.01 (minimum staffing) on closing one of the three Sydney fire stations. The Employer's position is that, since the Girard Award ordered only a declaration, there was nothing for it to enforce or to comply with and further, that the matter before this Board was *res judicata*. The Union seeks a Compliance Order compelling the Employer to abide by the minimum staffing provisions which Arbitrator Girard declared it to have violated, as well as damages against the Employer for intentionally disregarding the result of the original Award.

[Emphasis added]

[26] The decision then goes on to outline the background facts and the arguments of the parties. It then has a section titled "Analysis and Award". Again, its characterization of what it was being asked to do is flawed:

> 24. This Board is being asked to enforce a remedy given by an earlier Board, a remedy which was requested by the Union, which was not the subject of judicial review, and which is not subject to a continuing reservation of jurisdiction by the previous Board.

[27] The Ashley Board says that it is being asked to enforce a remedy given by an earlier Board. With respect, that was not what was requested of it in the grievance nor was it the argument put forward by the Union. The Union was arguing that the failure to properly staff the fire stations, after the Girard Award, amounted to a continuing or new breach of the Collective Agreement which justified further sanctions against the Municipality.

[28] The Ashley Board's misdirection to itself does not stop there. It continues:

> 26. One could possibly argue that the merits of the prior grievance and this one are not the same, as the earlier grievance dealt with the issue of whether the Employer violated the minimum staffing provisions in the context of the closure of the Ashby station, while the current grievance relates to enforcement of the

> earlier remedy. However, in my view, the essence of both grievances is the same. Quite apart from the question of whether we should feel bound by the earlier decision – the Employer argues that we should not – the substance of the issue has been dealt with.
>
> [Emphasis added]

[29] With respect, the "current grievance" did not in any way relate to the enforcement of the earlier remedy. It asked the arbitration board to make a determination as to whether there was a continuing breach. There is nothing ambiguous about the grievance.

[30] The Ashley Board never addressed the actual grievance. It goes on to outline in some detail the determinations of the Girard Board with respect to the violation of the agreement and the remedy which was sought. However, it never addressed whether the Municipality's continued failure to staff in accordance with the collective agreement represented a new or continuing breach of the collective agreement and whether it warranted further sanctions, including a compliance order.

[31] Finally, the Ashley Board concluded its decision in, what can only be described as, a somewhat unusual manner:

> 31. Here, the Union did not seek a compliance Order in the earlier arbitration. However, the Board did consider, and rejected, the possibility of granting a further remedy beyond the declaration by the Union. Opening up the question of remedy at this point would amount to second-guessing, reviewing, or substituting our judgment for the earlier Board's judgment. This is not a matter within our jurisdiction. In all of the circumstances outlined, the Employer's actions cannot be interpreted as a continuing breach of the collective agreement.
>
> [Emphasis added]

[32] This penultimate paragraph sets out three conclusions:

1. opening up the question of remedy on this arbitration would amount to second-guessing, reviewing or substituting one arbitration board's judgment for another;
2. the Ashley Board did not have jurisdiction; and
3. that the Employer's actions cannot be interpreted as a continuing breach of the collective agreement.

[33] I say it is unusual because the Ashley Board says on one hand that it does not have jurisdiction to entertain the grievance and then on the other hand says that the Employer's actions cannot be interpreted as a continuing breach of the collective agreement. It would, by necessity, have to have jurisdiction if it was going to make a determination of whether there is a breach of the collective agreement.

[34] In any event, its conclusion that it is not a continuing breach of the collective agreement is just that: a conclusion. There is absolutely no analysis or consideration of whether the Municipality's actions in failing to staff at the levels as set out in the collective agreement constituted a new or continuing breach.

[35] What constitutes a continuing breach is a question which must be answered by the wording of the collective agreement and the individual facts in the case.

[36] The comments of authors in Palmer & Snyder's *Collective Agreement Arbitration in Canada*, 6th ed. (Markham: LexisNexis, 2017) are helpful to understand the nature of a continuing grievance:

> 3.32. The essence of a continuing grievance is that the act complained of is one that recurs with the result that time can be treated as running anew each time the act is repeated. As noted in *Dominion Glass*, the principles on this matter, which can be elicited from the reported awards, appear to be the following:
>
> > …[T]he grievance to be a continuing one, must involve repetitive breaches of the collective agreement and not simply a single and isolated breach of the collective agreement. The damage complained of must be of a recurring kind and nature. Continuing grievances are usually (though not always) repeated violations of the collective agreement, involving the non-payment of money or benefits to individual employees or to the union, or conversely, the inflicting of damage on a recurring basis on the company by employees and the union withholding their services illegally. The board hastens to add that its analysis of a continuing grievance or a continuing violation of a collective agreement is by no means comprehensive or exhaustive. Many situations might arise which, on the individual facts and the individual wording of the collective agreement, might be encompassed by these terms.
>
> 3.33. Although there is some suggestion in the foregoing question that the continuity of damage is a criterion in this matter, this is clearly not the case; it is the recurrence of the act by the alleged violator of the collective agreement that is the basis for a finding in these cases. It is irrelevant that the consequences of the initial act are ongoing. This point was made when continuing grievances were defined as:

> …[G]rievances which do not relate to a single act possessing substantial finality, such as a discharge or a promotion, but relate instead to a continuing course of conduct – conduct which is renewed at regular intervals and is capable of being considered as a series of separate actions rather than as one action which may just happen to have continuing consequences.
>
> 3.34. When a series of acts has occurred, the problem thus arises as to whether each act can properly be characterized as a separate violation of a collective agreement or otherwise is a continuing grievance. On this point, the cases are not all reconcilable. …

[Emphasis added]

[37] To similar effect is the decision of the Board of Arbitration in *Family and Children Services of Renfrew County v. Ontario Public Service Employees Union*, 124 L.A.C. (4th) 321 (Ont. Arb.) where it held:

> 13 The seminal authority as to what constitutes a continuing grievance is the *Port Colborne General Hospital v O.N.A. case, supra*. The important passage is:
>
> > While the cases are not consistent in their treatment of the subject-matter of this grievance as either a continuing or non-continuing grievance, they do provide a useful framework for deciding the issue. It is clear from a reading of the cases that **the question that must be asked is whether or not the conduct that is complained of gives rise to a series of separately identifiable breaches, each one capable of supporting its own cause of action**. Allegations concerning the unjust imposition of discipline, the improper awarding of a promotion or the failure to provide any premium or payment required under the collective agreement on a single occasion, while they may have ongoing consequences, constitute allegations of discrete non-continuing violations of the collective agreement. In contrast, **an allegation of an ongoing failure to pay the wage rate or any benefit under the collective agreement** or an ongoing concerted work stoppage constitute allegations of continuing breaches of the collective agreement. **In these cases the party against whom the grievance is filed takes a series of fresh steps, each one giving rise to a separate breach. …**

[Emphasis in original]

[38] A continuing breach is an action or failure to act that reoccurs and each time it is repeated it constitutes a new breach.

[39] Before us, the Municipality argues that the closing of the Ashby station was a single isolated event and, therefore, it was not a continuing breach. It made the same argument in the court below. With respect, that misses the point. The Ashby station closing was something which the Municipality was entitled to do. It was not a breach of the collective agreement at all. The breach was the failure to staff the fire stations to the minimum staffing level.

[40] The issue, and the focus of the Ashley Board should have been, whether the Municipality's failure to staff the fire stations, as required by the collective agreement (and confirmed by the Girard Arbitration Board decision), was a continuing breach and, if so, what remedies arose from that continuing breach.

[41] My concerns with the Ashley Board decision do not end there. It somehow was of the view that the Union's failure to seek a compliance order before the Girard Board now precluded the Union from filing a subsequent grievance and seeking relief, if there were a continuing breach. It says:

> 28. Added to this background is the fact that the Union sought only a declaration as a remedy, rather than an Order requiring the Employer to take certain action. The Union argues here that it did so on the understanding that the Employer would heed and comply with the Board's interpretation of the collective agreement. As to why the Union did not seek enforcement of the Board's Order pursuant to Section 41H(1) of the *Trade Union Act*, there was really no 'Order' to be enforced.

[42] And again:

> 31. Here, the Union did not seek a compliance Order in the earlier arbitration. However, the Board did consider, and rejected, the possibility of granting a further remedy beyond the declaration by the Union. Opening up the question of remedy at this point would amount to second-guessing, reviewing, or substituting our judgment for the earlier Board's judgment. This is not a matter within our jurisdiction. In all of the circumstances outlined, the Employer's actions cannot be interpreted as a continuing breach of the collective agreement.
>
> [Emphasis added]

[43] It appears from this that the Ashley Board misunderstood the distinction between declaratory relief and compliance orders. Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., (loose-leaf), (Canada Law Book, Toronto: 2016) makes the distinction between the two:

> An arbitrator's authority to grant a declaration of rights where there is a *lis* or dispute, and where the party seeking it has an interest to be protected, has never been questioned. Indeed, it has been upheld that an individual grievor's claim for a declaration is within an arbitrator's power. Compliance orders, however, go beyond a mere declaration of legal rights, and either direct, in the manner of a *quia timet* order of specific performance, that some positive action be taken, or order, in the manner of an injunction, that the conduct in question be brought to an end. (page 2:1550)

[44] Declarations simply confirm the rights of the parties. Compliance orders go further to require some positive action be taken.

[45] The appellant in its factum has outlined a number of authorities that discuss the appropriateness and timing of compliance orders. I will refer to three of them to make the point that compliance orders, which are prospective in nature, are granted to allow an arbitrator's award to be enforced. They are not, generally, granted where there has been no persistent pattern of non-compliance.

[46] In *Hydro One Network Inc.*, 2011 O.L.R.D. No. 1667 (O.L.R.B.), the arbitrator held:

> 33. … The purpose or advantage of a compliance order is that it permits enforcement through contempt proceedings in Court rather than requiring the applicant to resort to the grievance and arbitration procedure. Such a prospective order is often granted where there is a pattern of delinquency and no assurance that such pattern will end. (See, for example, *Rainy Lake Hotel v. United Food and Commercial Workers Union, Local 175*, [2004] O.L.A.A. No. 336 and *Polax Tailoring Ltd. v.. Amalgamated Clothing Workers of America (Collective Agreement Grievance)*, [1972] O.L.A.A. No. 9). The present case is not, however, one in which there may be said to be a persistent pattern of non-compliance over a period of time, such that it would be unfair to require the applicant to seek enforcement through the grievance and arbitration procedure. There is also insufficient reason to believe that the likelihood of non-compliance in future will continue. In the present case, I am not persuaded that balance of convenience favours granting the requested compliance order and I therefore decline to make such an order.
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> [Emphasis added]

[47] Of similar effect is *Essar Steel Algoma Inc. v. United Steelworkers, Local 2251 (Scheduling Grievance)*, [2013] O.L.A.A. No. 388 (Ont. L.A.). The arbitrator declined to issue a compliance order noting that:

> [100] …It was generally inappropriate to grant a compliance order in the first decision in which a dispute about the obligation in issue is resolved. …

[48] Finally, in *Howe Sound Pulp and Paper Ltd. v. Unifor, Local 1119 (Contracting Out Grievance)*, [2014] B.C.C.A.A.A. No. 22 (B.C.L.A.), the arbitrator found that the compliance order was premature as there was no evidence to suggest future violations.

[49] Counsel for the Municipality before us and before the application judge, agreed that a compliance order would rarely be issued in the first arbitration unless there is some evidence the employer is not going to comply. The following exchange took place between the Municipality's counsel and the application judge:

> **THE COURT:** How do you respond to the case law cited to me by the applicant's counsel that the compliance order is rarely issued in the first arbitration unless there's some reason, some evidence that the employer is not going to comply?
>
> **MR. KACHAFANAS:** Oh, I would agree, it wouldn't even make sense to ask for a compliance order in the first instance, I would say. You're asking for a remedy. In this case, you'd be asking for the staffing to be put back. They didn't ask for it. The Arbitrator still could have ordered that; he chose not to.
>
> **THE COURT:** Um-hmm.
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> **MR. KACHAFANAS:** He said, "I'm not granting any other remedies." He turned his mind to it, right or wrong. That could be offensive, the Court may find that's wrong. We didn't, we're not here to debate that.
>
> **THE COURT:** Uh-hmm.
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> **MR. KACHAFANAS:** No one reviewed that decision.
>
> **THE COURT:** So you're, you're not faulting the Union for not looking for a compliance order before Girard?
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> **MR. KACHAFANAS:** No. What I'm saying ….

[50] In this case, the Union's explanation for not seeking a compliance order is eminently reasonable. It assumed once they had a declaration that the Municipality was in breach of the collective agreement that it would comply. Obviously, that confidence in the Municipality was ill-founded.

[51] The effect of the Ashley Board decision would mean that in every situation where a Union, or an employer, sought a declaration, and did not seek a

compliance order, one or other of the parties could continue to breach the collective agreement without repercussions. Such a conclusion is unreasonable. The dissenting panel member on the Ashley Board, Lawrence Cook, put it nicely in his decision:

> The Association did not ask for a compliance order before the Girard Board because it would not have been appropriate to do so. The caselaw is clear that compliance orders are not granted because there is an assumption that the employer will respond appropriately to a finding of breach by respecting the collective agreement in the future. Unless there has been a pattern whereby the employer has openly disregarded the collective agreement, arbitrators will not make a compliance order.

[52] The failure to request a compliance order at the first arbitration should have been of no consequence in considering the second grievance. It was reasonable for the Union not to request it. Further, in light of the authorities, it would not likely have been granted.

[53] Finally, the Ashley decision (¶27) and the application judge's decision (¶8) both say that the employer acted in good faith when restructuring. With respect, the employer's good faith had nothing at all to do with the continued breach of the collective agreement. I also agree with the dissenting member that the Municipality's good faith is not a justification for a continuing breach of the collective agreement. The dissenting member wrote:

> The comments from the Girard Board about the employer's good faith motives, and its right to restructure, cannot be interpreted in any way as a justification for allowing the employer to continue to breach the minimum staffing provisions of the collective agreement. Instead, the Board was noting that no further remedy (such as damages) would have been appropriate, given that the Board did have the right to close a fire hall, and given that its only breach was the fact that it misunderstood, in good faith, its staffing obligations following the close of the fire hall.

[54] The reasonableness standard requires us to read the arbitration board's reasons, together with the outcome, to determine whether the result falls within the range of possible outcomes (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62).

[55] In my view, the Ashley Board decision is unreasonable. It was asked to determine whether the failure to properly staff the fire stations by the Municipality was a continuing breach. The determination by the Girard Board that the

Municipality had breached the agreement was unambiguous. The Ashley Board's characterization of the task they had to perform cannot be discerned from any reasonable interpretation of the grievance.

[56] Similarly, its conclusion that the Municipality's actions were not a continuing breach are simply that - a conclusion. In these circumstances, it is unreasonable.

Conclusion

[57] I would set aside the application judge's decision upholding the Ashley Board decision. I would also set aside the Ashley Board decision. I would remit the matter back to a differently constituted Labour Arbitration Board for rehearing. To the extent that the Union has paid the costs award of $1,000 in the court below, I would order that the monies be repaid. I would award the Union costs of $3,000 inclusive of disbursements on this appeal.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Bourgeois, J.A.